BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HARRY K. MUCK	)	
Claimant	)	
VS.	)	
	)	Docket No. 162,138
SALVATION ARMY	)	
Respondent	)	
AND	)	
	)	
HOME INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and the Kansas Workers Compensation Fund appealed the Award entered by Administrative Law Judge Robert H. Foerschler dated November 4, 1996.

APPEARANCES

Claimant appeared by his attorney, Gerald C. Golden of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeffrey A. Dehon of Kansas City, Kansas.

RECORD

The Appeals Board reviewed the record listed in the Administrative Law Judge's Award. In addition, the Appeals Board included in the record the deposition of the claimant, Harry Kenneth Muck, taken on September 28, 1992.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Administrative Law Judge's Award. In addition, the Appeals Board adopted the stipulation filed by the respondent and the Kansas Workers Compensation Fund (Fund) on April 1, 1996, that stipulated the Fund would be liable for 50 percent of any award entered, excluding medical management expenses, or 50 percent of all authorized medical expenses voluntarily paid by respondent, if claimant's claim was denied.

ISSUES

Respondent and the Fund requested Appeals Board review of the following issues:

(1) Whether an employer/employee relationship existed between respondent and the claimant.

(2) Whether claimant's alleged accidental injury arose out of and in the course of his employment with the respondent.

(3) Whether claimant provided timely notice of accident pursuant to K.S.A. 44-520 (Ensley).

(4) Whether claimant served a timely written claim for compensation benefits on respondent.

(5) The nature and extent of claimant's disability.

(6) The liability of the Kansas Workers Compensation Fund (Fund).

In his brief filed before the Appeals Board the claimant raised the following issue:

(7) Claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge found claimant had proved he was entitled to workers compensation benefits for a work-related accidental injury that occurred on or about June 1, 1990. The Administrative Law Judge awarded claimant permanent partial general disability benefits of 29 percent based on permanent functional impairment.

The respondent and Fund appealed and argue that the claimant failed to meet his burden of proof on all issues in regard to compensability of the claim. On the other hand, the claimant agreed with the award, except claimant contends the award should have been computed based on a higher average weekly wage.

(1) The respondent argues that the parties are not covered by the Kansas Workers Compensation Act (Act) because the claimant and the respondent did not have an employer/employee relationship as required by the Act. The respondent contends the facts in the record support the conclusion that claimant was self-employed and therefore not an employee as defined in K.S.A. 1989 Supp. 44-508(b).

The Administrative Law Judge found claimant was an employee of the respondent for purposes of the Act. The Appeals Board agrees with the Administrative Law Judge and finds that conclusion is supported by both the testimony of the claimant and his supervisor in 1990, Lieutenant Colonel Harry Smith.

Claimant was employed by the respondent as an officer with the rank of major. In 1990, claimant testified he was responsible for all of the Salvation Army programs in Kansas City, Kansas. Claimant had the responsibility of maintaining these programs which included hiring, supervising, and recommending termination, if needed, for some 50 to 55 employees. The claimant reported to Colonel Smith who was located at the division headquarters in Kansas City, Missouri. The respondent supplied claimant with housing, transportation, and all necessary materials, policies, and procedures to operate the Kansas City Salvation Army unit. Although claimant had broad discretionary powers in managing his local unit, he nevertheless had to obtain division headquarters' approval on hiring and terminating personnel along with submission of budget and other requests for approval to division headquarters.

Colonel Smith, claimant's supervisor in 1990, testified that an officer for the respondent did not receive a salary but only an allowance. He further testified that for federal income tax purposes he and claimant, along with all other officers employed by the respondent, were considered self-employed persons. However, Colonel Smith also testified the respondent provided those officers, in addition to an allowance, benefits which included health insurance, pension, housing, and even an additional allowance to pay their social security and income taxes.

The Appeals Board finds the greater weight of the evidence in the record established, for purposes of coverage under the Act, there existed an employee/employer relationship between the respondent and the claimant. The respondent exercised control

over the major decisions that claimant had to make in the operation of the Salvation Army Kansas City unit and provided claimant with everything that was required for the operation of the unit. See Jones v. City of Dodge, 194 Kan. 777, 781, 402 P2d. 108 (1965).

(2) The claimant alleged he was injured on some six separate occasions from January 1988 through 1991 while employed by the respondent. Most of those separate incidents resulted in either an injury or exacerbation of symptoms in claimant's low-back area.

Claimant testified he injured his low-back in an automobile accident that occurred in a parking lot as he was on his way to attend a weight loss program in January of 1990. Claimant claims he arrived at the weight loss program approximately an hour and a half early in order to use their conference room to work on budget requests. Claimant claims he wanted to work on the budget requests at the weight loss program because he was uncomfortable at the office and the phones were ringing.

As a result of this January 1990 injury, claimant, on February 28,1990, underwent a bilateral laminectomy, nerve root decompression at L4-5 and L5-S1, and left sided diskectomy. Claimant reported to Ernest H. Neighbor, M.D., who performed an independent medical examination of claimant at the request of the Administrative Law Judge, that he did pretty well following the surgery for two months or so but in May of 1990 the same symptoms returned. Dr. Neighbor's report also indicated claimant gave a history that his low-back pain was exacerbated in June of 1990 when he was knocked down. Dr. Neighbor's independent medical examination report dated October 3, 1995, and a supplement report dated November 30, 1995, were the only medical evidence contained in the record. Therefore, the Administrative Law Judge's Award was based on Dr. Neighbor's assessment that claimant had a 29 percent permanent functional impairment to the body as a whole based on his examination of claimant and the AMA Guides to the Evaluation Permanent Impairment, Third Edition (Revised). Dr. Neighbor attributed claimant's functional impairment to the two-level operation and ongoing symptoms.

Claimant also testified he was knocked down some stairs on or about June 1, 1990, by an employee that had become belligerent at work. After this incident, claimant testified his back became symptomatic and he contacted his doctor. Claimant indicated the doctor told him to stay in bed a few days, to place ice on his back, and to continue with the medication he was taking as a result of the surgery. There was no indication from the claimant that his symptoms were severe enough to return to the doctor for treatment. However, during claimant's testimony at the regular hearing, he indicated his back still was stiff and he continued to have pain.

In November of 1990, claimant was placed on sick leave by the respondent because of his continuing low back problems. Claimant remained on sick leave until December 31, 1991, when he was placed on early retirement. While claimant was on sick leave between November of 1990 and December 31, 1991, the respondent continued to provide claimant

with a salary allowance, housing, and transportation. Also, during that period, claimant testified he aggravated his low back again while he was walking at a camp owned by the respondent where he was staying. Claimant stated he stepped in a hole which made his back symptomatic. Claimant admitted at that time he was on sick leave and he was not working for the respondent.

The Administrative Law Judge found claimant had proved he permanently aggravated his preexisting low-back condition when he was knocked down the stairs at work by the belligerent employee on or about June 1, 1990. The Appeals Board disagrees with this conclusion. The claimant in a workers compensation case is charged with the responsibility of proving by a preponderance of the credible evidence his right to an award of compensation. See K.S.A. 1989 Supp. 44-501(a); K.S.A. 1989 Supp. 44-508(g). The Appeals Board finds claimant has not met this burden of proof on the issue of whether claimant's work-related accident, that occurred on or about June 1, 1990, resulted in claimant's suffering additional permanent injury to his preexisting low-back condition.

This finding is supported by Dr. Neighbor's independent medical examination of claimant. The doctor reports claimant indicated his same back symptoms returned in May of 1990 after surgery. The claimant related to Dr. Neighbor that his back pain was only exacerbated by the June 1990 incident. Dr. Neighbor relates claimant's permanent functional impairment to the two-level operation with ongoing symptoms. Another significant indication that claimant suffered no further permanent injury as a result of the June 1990 incident is that claimant did not require any additional medical treatment.

Additionally, the record also presents claimant with another problem in an effort to relate this current low-back problems to the June 1990 incident. Claimant admits he further aggravated his low-back condition in 1991 in an intervening accident not connected with his employment. Therefore, the Appeals Board concludes claimant has failed to prove he permanently aggravated a preexisting low-back condition on June 1, 1990, while employed by the respondent.

As previously noted, claimant injured his low-back in the January 1990 automobile accident that resulted in claimant's need for surgery and his permanent disability. However, the Appeals Board concludes the January 1990 automobile accident did not arise out of and in the course of his employment with the respondent. This conclusion is supported by claimant's testimony that the accident occurred as he was driving into a parking lot on the way to a personal weight loss program. Claimant attempted to connect the personal weight loss program to his work by testifying he had arrived early for the program in order to work on budget requests. However, the Appeals Board finds claimant's effort to connect his work duties with the personal weight loss program is not credible or reasonable. The Appeals Board finds the January 1990 accident; that caused claimant's low-back injury, necessitated surgery, and resulted in permanent disability; occurred while claimant was driving to a personal activity and had no relationship to respondent's business activities.

(3) The Appeals Board finds the record established that the claimant gave notice of accident to the respondent in reference to the alleged accidents that occurred on January 6, 1988, February 11, 1989, August 1989, January 1990, and June 1990. There is no evidence in the record in reference to notice concerning the May of 1991 accident but the claimant admitted in his brief before the Appeals Board that this accident did not arise out of and in the course of his employment with the respondent.

(4) The Appeals Board has already found claimant failed to prove the June 1, 1990, work-related accident resulted in a permanent aggravation to his preexisting low-back injury which was caused by the January 1990 automobile accident not related to his employment with respondent. Therefore, whether claimant served a timely written claim for workers compensation benefits pursuant to K.S.A. 44-520a (Ensley), only applies to the January 6, 1988, February 11, 1989, and August 1989 accidents. At the regular hearing, claimant submitted proof that the respondent filed an Employers Report of Accident on January 23, 1988, with the Division of Workers Compensation in regard to the automobile accident of January 6, 1988. A copy of a Claim for Workmens Compensation for the February 11, 1989, work-related accident signed by claimant and dated December 15, 1991, was admitted into evidence at the regular hearing. The administrative file contains the Application for Hearing filed on January 10, 1992, with the Division of Workers Compensation for all of the claimant's alleged accidents.

The claimant was required by K.S.A. 44-520a (Ensley) to serve upon the respondent a written claim for workers compensation benefits within 200 days of the accident or within 200 days at the last payment of compensation. The dates of accident that remain in dispute in this case are January 6, 1988, February 11, 1989, and August 1989. The written claim for the February 11, 1989, accident is contained in the record and is dated December 15, 1991. The accidents that occurred on January 6, 1988, and August of 1989 are contained in the Application for Hearing filed with the Division of Workers Compensation on January 10, 1992. There is no evidence in the record as to the last date compensation was paid to the claimant for any of those accidents. The Appeals Board concludes the written claim for the February 11, 1989, accident, served on or about December 15, 1991, is not timely because it exceeds 200 days from the date of accident. The Appeals Board also finds that the Application for Hearing filed by the claimant on January 10, 1992, is untimely as it exceeds 200 days from the date of the January 6, 1988, and August 1989 accidents. Therefore, the Appeals Board concludes claimant's claim for workers compensation benefits for the date of accidents of January 6, 1988, February 11, 1989, and August 1989 is denied.

(5)(7) The Appeals Board finds these issues need not be addressed in this Order as they are rendered moot by the above findings.

(6) As noted in the above stipulation, the respondent and the Fund had filed a stipulation agreeing to 50 percent Fund liability. The stipulation also provided that if the

claim was found not compensable, then the Fund would reimburse respondent for 50 percent of the authorized medical expenses voluntarily paid by the respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler is reversed and claimant is denied an award of compensation against the respondent, Salvation Army, and its insurance carrier, Home Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury sustained on or about June 1, 1990.

Cost of transcripts in the record are taxed against the respondent and its insurance carrier as follows:

Hostetler & Associates, Inc.	$301.60
Metropolitan Court Reporters, Inc.	$345.00

The Workers Compensation Fund as stipulated is ordered to pay 50 percent of all authorized medical expenses voluntarily paid in the Award.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gerald C. Golden, Kansas City, Kansas
John David Jurcyk, Lenexa, Kansas
Jeffrey A. Dehon, Kansas City, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director